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U.S. DISTRICT COURT E.D.N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

★ SEP 18 2005 ★

In The Matter of

UNITED STATES OF AMERICA,

Plaintiff,

PATRICK McFADDEN,

Defendant.

LONG ISLAND OFFICE

Criminal Case No.

2:04-cr-00455-ADS-9

United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

Thursday,
September 1, 2005

BEFORE:

HON. JAMES ORENSTEIN,
Magistrate Judge

APPEARANCES :

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I N D E X

TESTIMONY

WITNESS

EXAMINED BY

PAGE

Patrick McFadden

The Court

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EXHIBITS

DESCRIPTION

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Court Exhibit 1

Agreement

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1 P R O C E E D I N G S

2 THE COURT CLERK: Calling case CR-04-455,
3 USA versus McFadden.

4 Counsel, please state your appearance for
5 the record.

6 MR. FERAZANI: Lawrence Ferazani, on behalf
7 of the United States. Good afternoon, Your Honor.

8 THE COURT: Good afternoon, again.

9 MR. MCINNIS: Timothy J. McInnis, on behalf
10 of Patrick McFadden, who is here with me.

11 THE COURT: Good afternoon. Is it -- is it
12 McInnis?

13 MR. MCINNIS: Yes.

14 THE COURT: Okay. Good afternoon.

15 And, you're Mr. McFadden?

16 THE DEFENDANT: Pat McFadden, Your Honor.

17 THE COURT: All right. Have -- have a
18 seat, please.

19 Mr. McFadden, we're here because I'm told
20 you wish to plead guilty to Count Three of the
21 indictment.

22 Is that correct?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: All right. Now, I'm going to
25 have to explain a number of things to you, and I'm

1 going to have to ask you certain questions. And, your
2 answers must all be truthful and under oath.

3 So, the first order of business is, if you
4 would please stand while Mrs. Savona swears you in.

5 Whereupon,

6 PATRICK McFADDEN,

7 after first being duly sworn, was called as
8 a witness herein, and was examined and testified as
9 follows:

10 EXAMINATION BY THE COURT

11 BY THE COURT:

12 Q Have a seat, please. And, you're going to
13 have to answer out loud. Please try and speak so I
14 can hear you. There is a microphone there, so that --
15 and, we're recording this.

16 And, Mr. McFadden, first of all, do you
17 understand that, having been sworn to tell the truth,
18 you must tell the truth. And, if you were to
19 deliberately lie in response to any question that I
20 ask you, you could face further criminal charges for
21 perjury.

22 Do you understand that?

23 A Yes, I do, Your Honor.

24 Q All right. If I say anything that you don't
25 understand, or if you need me to repeat anything, just

1 ask. If you need some time to talk to your attorney,
2 take it. I'll wait for you. It's important that you
3 understand everything that goes on today.

4 Do you understand?

5 A Yes, Your Honor.

6 Q All right. Now, I'm going to ask -- start
7 out by asking you some questions, to make sure that
8 you understand, you know, your surroundings, and that
9 you're competent to proceed.

10 So, tell me, please, how old are you?

11 A Thirty-four.

12 Q And how far did you get with your education?

13 A The second year in college.

14 Q And, are you presently, or have you recently
15 been under the care of a doctor or a psychiatrist for
16 any reason?

17 A No, Your Honor.

18 Q In the past twenty-four hours, have you
19 taken any pills, drugs, medications, or any kind of
20 alcoholic beverage?

21 A I had a sleeping pill, last night.

22 Q All right. When did you take the sleeping
23 pill?

24 A Eleven o'clock.

25 Q All right. Did you get a full night's

1 sleep?

2 A No, Your Honor. Well, a decent night.

3 Q Well, I can certainly understand why you may
4 not. What I need to know, really, is do you feel any
5 aftereffects of the sleeping pill?

6 A No, Your Honor.

7 Q All right. Have you ever been hospitalized
8 or treated for any drug-related problem?

9 A No, Your Honor.

10 Q And, just about the sleeping pill, that was
11 just an over-the-counter drugstore kind of sleeping
12 pill?

13 A Unisom.

14 Q Unisom, okay.

15 Do you feel that your mind is clear, as you
16 sit here today?

17 A Yes, Your Honor.

18 Q Have -- so far, do you have any trouble
19 understanding me?

20 A No, Your Honor.

21 Q Okay.

22 THE COURT: Had -- Mr. -- I'm sorry,
23 McInnis, right?

24 MR. MCINNIS: Yes.

25 THE COURT: Let me write it down, so I

1 remember.

2 Mr. McInnis, have you discussed with your
3 client his decision to plead guilty?

4 MR. MCINNIS: Yes, I have.

5 THE COURT: And, in your view, does he
6 understand the rights that he would be waiving by
7 doing so?

8 MR. MCINNIS: Yes, he does.

9 THE COURT: Do you have any question, as
10 his -- as to his competency to proceed today?

11 MR. MCINNIS: None.

12 BY THE COURT:

13 Q Mr. McFadden, you have the right to counsel,
14 obviously, and you have the assistance of Mr. McInnis.

15 THE COURT: Mr. McInnis, are you retained
16 or appointed?

17 MR. MCINNIS: Appointed, Your Honor.

18 Q All right. Well, so the Court has appointed
19 Mr. McInnis to -- to represent you, and I understand
20 that he is an experienced criminal defense lawyer.

21 Are you satisfied with the assistance that
22 you have obtained thus far from him?

23 A Yes, Your Honor.

24 Q Do you feel you need any more time to
25 discuss anything with him, before proceeding?

1 A No, Your Honor.

2 Q All right. Now, you should understand that
3 I'm what's called a Magistrate Judge. The case is
4 assigned to what's called a District Judge, which is a
5 higher level of Judge, who is appointed by the
6 President for life. That's Judge Spatt.

7 Now, Judge Spatt has referred this matter to
8 me, but you have the right to have this proceeding
9 take place before a District Judge. Now, if you
10 consent, we'll go forward. But, if not, there's, you
11 know, no problem. We'll wait until Judge Spatt is
12 available, and you can proceed before him?

13 Do you understand that?

14 A Yes, Your Honor.

15 Q Do you consent to having this proceeding
16 happen before me?

17 A Yes, Your Honor.

18 Q All right. Now, if you'll bear with me for
19 a moment, I have to discuss a matter with the
20 Prosecutor, to ask him about compliance with the
21 statute that gives certain rights to crime victims.

22 THE COURT: Mr. Ferazani, could you just
23 place on the record what steps you've taken to notify
24 victims in this case?

25 MR. FERAZANI: Our office has identified

1 the victims of Mr. McFadden and his co-conspirators'
2 crime. We have notified those victims of the pending
3 action, and provided them with an access code that
4 permits them to access this -- a Website and also a
5 telephone database, that will inform them of pending
6 pleas, hearings, et cetera. We have placed notice of
7 this plea on the -- on that system, but it was placed
8 on the system this morning, Your Honor.

9 THE COURT: Right, and that's because
10 they're, obviously, faced with a trial starting next
11 week. There wasn't time to do anything further?

12 MR. FERAZANI: That's correct, Your Honor.
13 We were scheduled to pick a jury next week, and we've
14 just agreed upon a resolution last evening.

15 THE COURT: All right. Notwithstanding
16 that, are you aware of any victim who has expressed a
17 desire either to attend or to be heard?

18 MR. FERAZANI: No, Your Honor.

19 THE COURT: And, I'll -- just in case there
20 is anyone present, is there any victim present in the
21 courtroom who wishes to be heard, as to this plea?

22 [No response.]

23 THE COURT: All right. I don't hear any.

24 Now, Mr. McInnis, I don't know if you've
25 discussed this with Mr. Ferazani. Because the docket

1 reflects that there may be a speedy trial issue here,
2 before proceeding with the plea, I'm going to ask your
3 client about whether he'd waive his rights under the
4 Speedy Trial Act, as well.

5 Do you have any problem with that?

6 MR. McINNIS: No, I have discussed it with
7 Mr. Ferazani. I have also discussed it with my
8 client.

9 THE COURT: Okay, very good.

10 BY THE COURT:

11 Q Mr. McFadden, what I've just been discussing
12 with your attorney, you have -- you have the right
13 and, in fact, the law requires that the trial of the
14 charges against you start with seventy days of your
15 first appearance to answer the charges.

16 Do you understand that, so far?

17 A Yes, Your Honor.

18 Q Now, it looks to me, from the -- from the
19 official docket of this case, that more than seventy
20 days have passed since you've answered the charges.
21 Now, the law allows a certain time to be excluded, and
22 it has been. But, even with that, it looks like more
23 than seventy days have passed.

24 It may be because some time was excluded,
25 and the docket just doesn't reflect that. I don't

1 know. But, to be on the safe side, I want to make
2 sure you understand your rights.

3 Where -- where more than seventy days pass
4 before the trial -- seventy days that count, that is
5 -- you can ask to have the charges dismissed. And, if
6 you ask that, the Judge, if -- if he agreed that more
7 than seventy days have passed, would have to dismiss
8 the charges against you.

9 If that happened, the Government would have
10 the right to try and reinstate the charges. If it
11 tried -- you know, it may or may not try to do that,
12 if the case were dismissed. And, if it tried, it may
13 not -- it may not succeed in getting the charges
14 reinstated.

15 So, you know, we could end up in this exact
16 same position we're in today, or we could end up with
17 no charges being filed against you at all.

18 Do you understand that?

19 A Yes, Your Honor.

20 Q If we're going to proceed today, it's only
21 because you've consented to waive your right to have
22 the case dismissed, on the grounds that the trial
23 didn't start fast enough. And, you'd also be waiving
24 your right to appeal to a higher court that they
25 should throw out any conviction because the trial

1 didn't start soon enough.

2 Do you understand that?

3 A Yes, Your Honor.

4 Q Are you willing to waive your right to ask
5 to have the case dismissed on speedy trial grounds?

6 A Yes, Your Honor.

7 Q And are you also willing to waive your right
8 to appeal to a higher court on the grounds that the
9 case should have been dismissed on those grounds?

10 A Yes, Your Honor.

11 Q All right. Very good.

12 MR. MCINNIS: Your Honor, just to make the
13 record --

14 THE COURT: Yes.

15 MR. MCINNIS: -- complete, he may not even
16 have that right because, in fact, there may have been
17 a tolling that was in place. I have been, I think, at
18 all the prior proceedings, and it's my recollection
19 that at each one, Judge Spatt asked the attorneys to
20 consent to a waiver of the Speedy Trial Act, and
21 that's my recollection that I sit here right now, that
22 that, in fact, happened.

23 THE COURT: Yeah, no. I understand that.
24 I appreciate you -- you making that record. The
25 reason I do this is because it -- at least as far as

1 the docket reflects, it appears that a hundred and
2 thirty-two days have passed, of non-excludable time.

3 It may be that the docket simply doesn't
4 reflect all of the orders. But so -- so that there's
5 no question later, I wanted to go over that with your
6 client.

7 BY THE COURT:

8 Q All right, now, Mr. McFadden. Let me
9 describe to you the charge that's against you, to
10 which you propose to plead guilty, and make sure that
11 you understand what the Government would have to do to
12 prove that you're guilty.

13 The charge is called securities fraud. And,
14 to prove you guilty, the Government would have to
15 prove that you were involved in -- in a scheme, either
16 yourself or together with others, to defraud people,
17 to obtain money or property, you know, by using false
18 statement, or false pretenses, or by withholding
19 information that they should otherwise have gotten, in
20 such a way that they would be deceived. And to do
21 that, in connection -- in this case, with the sale or
22 purchase of stocks.

23 The Government would have to prove that in
24 doing -- in -- in performing this, in conducting this
25 scheme, that you or anyone else who was involved, used

1 the telephone, or the mails, or the Internet. And,
2 the victims of this scheme, as charged by the
3 Government, they would have to prove were, you know,
4 somewhere in the United States, perhaps all over the
5 United States.

6 Do you understand that?

7 A Yes, Your Honor.

8 THE COURT: Did I miss any elements, Mr.
9 Ferazani?

10 MR. FERAZANI: No, Your Honor.

11 Q All right. Do you feel you understand the
12 charge?

13 A Yes, Your Honor.

14 Q Now, you have a right to plead not guilty,
15 as you've already done. You have a right to plead not
16 guilty to this charge, and to go to trial.

17 Do you understand that?

18 A Yes, Your Honor.

19 Q If you plead guilty today, you'll be giving
20 up some very valuable rights. So, I want you to
21 listen carefully.

22 First of all, you have a right under the
23 Constitution and laws of the United States to a speedy
24 and public trial by jury, with the assistance of your
25 attorney.

1 Do you understand that?

2 A Yes.

3 Q At any trial, you would be presumed to be
4 innocent. You wouldn't have to prove that you're
5 innocent.

6 And that's because, under our system of law,
7 it's the Government that must come forward with proof
8 that establishes beyond a reasonable doubt that you're
9 guilty of the crime charged. If the Government failed
10 to meet that burden of proof, the jury would have a
11 duty to find you not guilty.

12 Do you understand that?

13 A Yes.

14 Q Now also, at the trial, witnesses for the
15 Government would have to come forward to court and
16 testify in your presence. Your lawyer would have the
17 right to cross-examine the witnesses. He could raise
18 legal objections to any evidence that the Government
19 tried to offer against you.

20 And, your lawyer could offer evidence in
21 your behalf, if he thought that there was any evidence
22 that would help you.

23 Do you understand that?

24 A Yes, Your Honor.

25 Q Now also, at the trial, you would have the

1 right to testify in your own behalf, if you wished to
2 do so. On the other hand, you could not be forced to
3 be a witness at the trial.

4 And that's because, under our Constitution
5 and laws, no person can be compelled to be a witness
6 against himself. So, if you wished to go to trial but
7 you chose not to testify, the Judge would instruct the
8 jury that they could not hold that fact against you.

9 Do you understand that?

10 A Yes, Your Honor.

11 Q Now if, instead of going to trial, you plead
12 guilty to the crime charged, and if based on my
13 recommendation Judge Spatt accepts your guilty plea,
14 you'll be giving up your right to a trial, and all of
15 those other rights that I've just discussed with you.
16 There will be no trial in this case. There will be no
17 appeal on the question of whether you did or did not
18 commit -- commit the crime charged.

19 The only thing that you could appeal would
20 be if you thought that I didn't follow the law
21 properly, in conducting this proceeding or, with some
22 possible exceptions, which I'll get to in a moment --
23 or if you thought that Judge Spatt didn't follow the
24 law in imposing sentence.

25 But, with respect to the question of whether

1 you're guilty or innocent, that would be settled for
2 all time. You wouldn't be able to appeal and say you
3 weren't guilty.

4 Do you understand that?

5 A Yes, Your Honor.

6 Q All right.

7 THE COURT: Is there any waiver of
8 sentencing appeal?

9 MR. FERAZANI: There is, Your Honor, if the
10 term of imprisonment is sixteen months or below.

11 THE COURT: You know what? I'm looking at
12 the wrong document. I'm sorry.

13 MR. FERAZANI: Paragraph 4, Your Honor.

14 THE COURT: Yeah, I know. I was looking at
15 -- at a different document. Yes.

16 BY THE COURT:

17 Q And, the document Mr. Ferazani is referring,
18 to Mr. McInnis [sic] -- McInnis, I'm sorry. Forgive
19 me. Mr. McFadden.

20 I have in front of me a six-page document,
21 entitled "United States of America against Patrick
22 McFadden, plea agreement." And, on the last page, it
23 appears to have Mr. Ferazani's signature, his
24 supervisor's, your signature, Mr. McFadden, and your
25 attorney's.

1 Do you have a copy in front of you?

2 A Yes, Your Honor.

3 Q All right. And, I've got the original
4 marked as Exhibit 1.

5 (The document referred to was
6 marked for identification as
7 Court Exhibit No. 1.)

8 Q Is that your signature on the -- on the last
9 page?

10 A Yes, Your Honor.

11 Q All right. I'll -- I'll have -- well, let
12 me ask you. I'll ask you more about this, in a
13 moment.

14 But, just to get back to your rights. As I
15 said, the issue of your guilt, if you plead guilty,
16 will be done for all time.

17 Do you understand that?

18 A Yes.

19 Q Now, if you plead guilty, I'm going to have
20 to ask you certain questions about what it is you did
21 that makes you guilty, so that I can be satisfied that
22 there is a basis for your plea.

23 You'll have to answer my questions and
24 acknowledge your guilt. That means you'll be giving
25 up your right not to incriminate yourself.

1 Do you understand that?

2 A Yes, Your Honor.

3 Q And are you willing to give up your right to
4 a trial, and the other rights that I've been
5 discussing with you?

6 A Yes, Your Honor.

7 Q Now, I've mentioned before that -- that
8 document entitled "plea agreement."

9 Is this your -- is this document -- is that
10 your agreement with the Government?

11 A Yes, Your Honor.

12 Q Now, I'm not going to highlight it. I'm not
13 going to discuss one provision rather than another.
14 Because, what you should understand is it's your
15 entire agreement, and every -- every part of it is --
16 is as important as every other.

17 Do you understand that?

18 A Yes, Your Honor.

19 Q What I want to know is, first of all, do you
20 understand it?

21 A Yes.

22 Q And -- and, I take it you've read the entire
23 agreement?

24 A Yes, sir.

25 Q And, have you discussed it with your

1 attorney?

2 A Yes, Your Honor.

3 Q When you signed it, by signing the
4 agreement, did you mean to indicate that you
5 understood it, and that you consent to be bound by --
6 by the agreement?

7 A Yes, Your Honor.

8 Q All right. Is there any other promise
9 that's been made to you, other than the promises made
10 in this agreement, is there any other promise that's
11 been made to you by the Government, or on behalf of
12 the Government, that isn't set forth in that
13 agreement?

14 A No, Your Honor.

15 Q Okay. Now, if you're unsure, --

16 A Yeah, I'm a little --

17 Q -- ask or -- or talk it over with your
18 attorney.

19 (Defendant and counsel conferring.)

20 A No, Your Honor.

21 Q All right. The reason I want to be careful
22 about this is, is I don't want there to be any
23 misunderstanding about what the Government has
24 promised you, or what you think the Government has
25 promised you, because I wouldn't want you to come back

1 later and say "I thought the Government was going to
2 do something and they didn't."

3 Because everyone is going to look to this
4 agreement, this written document, as what the
5 Government has promised you to do. So, if you think
6 there's something else that they have promised, that's
7 not in this agreement, I need to know about it now.

8 Is there?

9 A No.

10 Q Okay. Now, I have to be certain that you
11 understand the potential consequences of -- of
12 pleading guilty.

13 The -- the charge to which you propose to
14 plead guilty -- securities fraud -- carries a maximum
15 term of ten years in prison.

16 Do you understand that?

17 A Yes, Your Honor.

18 Q Also, if you are sentenced to prison, you
19 could also be sentenced to a term of supervised
20 release. And, what that means is that after you leave
21 prison, you could be required to -- to abide by
22 certain conditions for a period of up to three years.

23 And if, during that period of up to three
24 years, you violated any of the conditions of your
25 release, you could be sent back to prison, for up to

1 two years. And, you wouldn't get any credit for the
2 time previously served.

3 Do you understand that?

4 A Yes, Your Honor.

5 Q In addition, you could -- in addition to the
6 prison time, you could also be required to pay a fine
7 of up to a million dollars, or double the amount of
8 loss caused to any victims, or double the amount of
9 gain that you obtained by committing the crime,
10 whichever of those amounts is greatest.

11 Do you understand that?

12 A Yes, Your Honor.

13 Q Also, the Judge will have to require you to
14 pay restitution to any victims of the offense. And,
15 you should understand that the amount of restitution
16 isn't known yet.

17 So, if -- if you don't want to plead guilty
18 without knowing what all of the consequences might be,
19 don't plead guilty, because I can't tell you what the
20 restitution will be in this case.

21 Do you understand that?

22 A Yes, Your Honor.

23 Q Do you wish to proceed, anyway?

24 A Yes, Your Honor.

25 Q All right. Finally, the Judge must impose,

1 in addition to everything else, a one hundred dollar
2 special assessment.

3 Do you understand that?

4 A Yes.

5 Q All right. Now, in sentencing you, Judge
6 Spatt is going to have to consider the Federal
7 Sentencing Guidelines.

8 THE COURT: Mr. McInnis, have you had a
9 chance to discuss those Guidelines with your client?

10 MR. MCINNIS: Yes, I have.

11 THE COURT: All right.

12 Q And, Mr. McFadden, have you discussed those
13 Guidelines with your attorney?

14 A Yes, Your Honor.

15 Q Tell me, as best -- as best you understand
16 it, what the Federal Guidelines are.

17 A I could face up to ten years in prison.

18 Q Um hmm.

19 A Or probation.

20 Q Um hmm. Well, that -- that's the maximum
21 sentence and the minimum, right? But, the Federal
22 Guidelines, the Sentencing Guidelines, are slightly
23 different.

24 And, if you need some time to discuss it
25 with your attorney, I'll -- I'll certainly wait.

1 But, the Guidelines help a Judge decide
2 where, within that range from zero to ten years, you
3 should be sentenced. And, essentially, they create a
4 point system that add and subtract aggravating and
5 mitigating circumstances, depending on your conduct,
6 and all of the circumstances in the case.

7 So, the factors that could be considered
8 include, for example, the amount of loss to the
9 victims, your role in the offense, whether a weapon
10 was involved -- and I'm not suggesting that there was.
11 I don't know. Whether a victim was injured. Whether
12 any special skill was used in committing the offense.
13 Whether you obstructed justice, or whether you've
14 accepted responsibility for your actions. Among many
15 other factors.

16 Now, has your attorney -- first of all, do
17 you understand that?

18 A Yes, I do.

19 Q All right. Has your attorney discussed with
20 you what he estimates the Guidelines calculation will
21 be in this case?

22 A Yes, he has.

23 Q All right. And, I see in the plea
24 agreement, that there is also an estimate there, of a
25 range of ten to sixteen months.

1 You've got that estimate. You've got
2 whatever your attorney estimated for you. I don't
3 know if the Prosecutor has given you a different
4 estimate.

5 What you should understand is none of those
6 estimates may mean a thing. The -- they may be right
7 and they may be wrong. We don't know, yet.

8 Do you understand that?

9 A Yes, Your Honor.

10 Q All right. Now, in addition, you should
11 understand that under a recent Supreme Court decision,
12 the Sentencing Guidelines range, you know, that ten to
13 sixteen months, or whatever the range turns out to be
14 -- that range isn't mandatory. In other words, the
15 Judge will have to consider the Sentencing Guidelines
16 range, but he won't be required to impose a sentence
17 within that range.

18 And, after considering the Guidelines range,
19 the Judge will also have to consider other factors.
20 He'll have to consider the factors that include the
21 nature and circumstances of the offense, and your
22 history and characteristics. But, he'll also need to
23 consider the need for the sentence to reflect the
24 seriousness of the offense, to promote respect for the
25 law, and to provide just punishment for the offense.

1 He'll also have to consider the need for a
2 sentence to provide deterrents to other criminal
3 conduct, and to protect the public from further crimes
4 by you. If you cooperate with the Government, then
5 under certain circumstances, the Judge will have to
6 take that into account, as well.

7 And, he'll have to take all these things
8 into consideration, and come up with a sentence that's
9 reasonable, after considering the Sentencing
10 Guidelines range and these other circumstances that
11 I've discussed with you.

12 Do you understand, so far?

13 A Yes, Your Honor.

14 Q Now, you're going to have to report to the
15 probation officer and -- who will ask you questions
16 about your entire life, from the time that you were
17 born, with regard to any criminal history you may
18 have, your employment, marriages, divorces, children,
19 sickness, military service, Boy Scout service,
20 charitable work, religious activities, and everything
21 else in your life.

22 And then, the Probation Department will give
23 the Judge a pre-sentence report. And, you'll see it,
24 as well. And, in that report, they'll review the
25 sentencing guidelines and all the factors, and they'll

1 recommend to the Judge a point level and a sentencing
2 range which, as I've told you, isn't mandatory, but
3 which the Judge must consider. And, that sentencing
4 range will be set forth in terms of months.

5 Now, when you see that report, you may have
6 had your mind set on ten to sixteen months, or some
7 other amount, but the recommendation in the report may
8 be for a longer period. And, if that's the case, you
9 won't be happy.

10 But, one thing that you won't be allowed to
11 do at that point is withdraw your guilty plea simply
12 because you don't like the sentence that it
13 recommends.

14 Do you understand?

15 A Yes, Your Honor.

16 MR. MCINNIS: Your Honor, --

17 Q So, what I'm telling you now is that nobody
18 knows what the Sentencing Guidelines recommendation
19 will be. Nobody knows what a reasonable sentence will
20 be. Nobody knows what sentence the Judge will
21 actually impose.

22 So, if you want to -- if you want to avoid
23 uncertainty as to any of those matters, don't plead
24 guilty.

25 Do you understand?

1 A Yes, Your Honor.

2 Q Do you wish to proceed?

3 A Yes, Your Honor.

4 Q All right.

5 MR. McINNIS: Your Honor, could I say
6 something about the estimate?

7 THE COURT: Yes.

8 MR. McINNIS: As you can see from the plea
9 agreement, the Government estimates a level twelve, --

10

11 THE COURT: Yes.

12 MR. McINNIS: -- and one of the things that
13 that's based on is an inclusion of two levels for use
14 of sophisticated means to commit the offense.

15 THE COURT: Um hmm.

16 MR. McINNIS: And the -- I've told the
17 Government, and I think that they are anticipating,
18 that we may be making a motion at the time of
19 sentencing that that would not apply in this case.
20 And, they may or may -- they may or may not agree with
21 that, or they may take a contrary position.

22 But, I just wanted the record to reflect
23 that, as of today, Mr. McFadden is planning on, in
24 effect, challenging that. And, by doing that, he is
25 not in any way diminishing his acceptance of

1 responsibility. It's just a legal right that I have
2 asked to preserve on his behalf.

3 THE COURT: All right. Is it your
4 understanding, Mr. Ferazani, that Mr. McFadden retains
5 that right?

6 MR. FERAZANI: Yes, Your Honor.

7 THE COURT: All right.

8 MR. MCINNIS: And, there was one other
9 thing, as well.

10 THE COURT: Yes.

11 MR. MCINNIS: The -- I'm sorry.

12 THE COURT: That's okay.

13 MR. MCINNIS: The plea agreement also
14 provides that Mr. McFadden make a motion for a
15 downward departure from the Sentencing Guidelines, and
16 that the U.S. Attorney's Office will not be filing
17 anything in opposition to that motion.

18 THE COURT: All right. That's fine. And,
19 you know, just so it's clear. I've made the plea
20 agreement, in its entirety, an exhibit -- Exhibit 1
21 for these proceedings. And, all of its -- all of its
22 provisions control here.

23 But again, Mr. Ferazani, to the extent that
24 Mr. McInnis has referred to one portion of it, do you
25 agree with his characterization?

1 MR. FERAZANI: Your Honor, that's
2 specifically outlined in Paragraph 5(b), yes.

3 THE COURT: All right, very good.

4 BY THE COURT:

5 Q Now, getting back to the question I had, and
6 you may have answered it, but I'm not certain.

7 As I said, if you want to avoid any
8 uncertainty or all uncertainty -- about what a
9 reasonable sentence will be, what the Guidelines will
10 be, or what your ultimate sentence will be -- you
11 really shouldn't plead guilty, if you want to avoid
12 that uncertainty.

13 If you're willing to proceed, despite that
14 uncertainty, let me know.

15 A I'm willing to proceed, sir.

16 Q All right. Now, as I mentioned, you'll --
17 you will receive a copy of that pre-sentence report
18 that the Probation Department will prepare. And,
19 you'll have an opportunity to go over it, along with
20 your attorney.

21 Now, if you think the report itself is
22 mistaken or incomplete in any way, you'll have the
23 opportunity to bring that to the Judge's attention.

24 Do you understand?

25 A Yes, Your Honor.

1 Q Now, at the time of sentencing, you'll have
2 the right to speak, and your attorney will have the
3 right to speak, and the Prosecutor will. And also,
4 any victims who appear may have the right to -- will
5 have the right to speak. And, all of them may make
6 recommendations as to what the sentence should be.

7 And, I'm confident that Judge Spatt will
8 listen carefully to everything that's said. But what
9 you have to understand is that the final
10 responsibility for sentencing you is Judge Spatt's,
11 and his alone. And he may be persuaded by what the
12 attorneys or the victims say, or by what you say.
13 And, he may not.

14 He may also view the case entirely
15 differently, and he may not impose the sentence that
16 anyone has recommended. He may impose a higher
17 sentence. So, nobody can promise you today what
18 sentence the Court will impose.

19 Is that clear?

20 A Yes, Your Honor.

21 Q Now, after the Judge imposes a sentence, if
22 you or your attorney think that he hasn't properly
23 followed the law in sentencing you, then you can --
24 you can sentence -- you can appeal that sentence to a
25 higher court and ask them to correct any sentence --

1 any mistake that was made in sentencing you, with one
2 very important provision, which is even if there's a
3 mistake in sentencing, if the sentence imposed on you
4 is sixteen months or less, then you can't appeal, even
5 if there's a mistake.

6 Do you understand that?

7 A Yes, Your Honor.

8 Q Now, of course, if the sentence is higher
9 than sixteen months, and you think there's been a
10 mistake -- a mistake, then of course you are free to
11 appeal.

12 Do you understand that?

13 A Yes, I do.

14 Q All right. And, you're willing to waive
15 your right to appeal -- to appeal an incorrect
16 sentence below sixteen months or sixteen months?

17 A Correct.

18 Q Okay. Now, do you have any -- any questions
19 that you'd like to ask me about the charge, about your
20 rights, about the possible sentence, the Sentencing
21 Guidelines, what constitutes a reasonable sentence,
22 how sentencing will proceed, or anything else in this
23 matter?

24 A No, Your Honor.

25 Q All right. Because now is the time. If you

1 have any questions, now is the time. All right.

2 THE COURT: Mr. McInnis, is there anything
3 else you'd like me to discuss with your client in
4 further detail?

5 MR. MCINNIS: Just one thing that I wanted
6 to mention, with respect to the charge. And, my
7 understanding is he's going to be pleading guilty to
8 Count Three, the securities fraud count, which
9 incorporates by reference about twenty-five or twenty-
10 six other allegations from other counts. And, if he
11 does plead guilty to that, the Count Three, he's not,
12 in effect, pleading guilty to each of those
13 allegations.

14 THE COURT: I'm not certain about that.
15 And, Mr. Ferazani, I'd like your input.

16 MR. FERAZANI: One moment, Your Honor?

17 (Pause)

18 MR. MCINNIS: Just, if I could elaborate,
19 while -- so that -- so that everyone understands the
20 context?

21 For example, there are counts -- there are
22 allegations that say that there was a conspiracy, and
23 it took place from 1999 to 2002. Well, Mr. McFadden
24 was only at that place of employment for four months,
25 in 2002. He has nothing to do with activity that

1 happened in '99, 2000, 2001, and so on.

2 There are allegations that concern other
3 securities, other than the Classica security which is
4 the core of Count Three. And, there are also
5 allegations about things like money laundering
6 activities.

7 So, those allegations formally are
8 incorporated into Count Three, in Paragraph 30, but
9 it's my understanding that Mr. McFadden is going to be
10 pleading guilty to securities fraud for having
11 received excessive commissions that were not properly
12 disclosed to the customer, but not the other
13 allegations in the --

14 THE COURT: All right. Mr. McInnis, look,
15 the -- the indictment says what it says. And, I'm
16 sure you've negotiated hard on behalf of your client.
17 And obviously, you are not in a position -- your
18 client isn't in a position -- isn't in a position to
19 say whether things attributed to others are true or
20 not.

21 But, Count Three does incorporate those
22 other -- those other allegations. Now, Mr. Ferazani,
23 what's the Government's position on -- as to whether,
24 by pleading guilty to Count Three, Mr. McFadden, you
25 know, pleads guilty to the entirety of the -- of the

1 charge, and all the allegations made in support of it?

2 MR. FERAZANI: Well, to the extent that
3 Paragraphs 1 through 24 merely outline facts and
4 background of Donald and Company, as -- as Mr. McInnis
5 outlined, regarding its existence prior to Mr.
6 McFadden attending or joining the firm, Mr. -- the
7 Government's agreement under the plea agreement is to
8 dismiss Counts One, Two, and Four, to the extent Mr.
9 McFadden even was charged, --

10 THE COURT: Mr. McFadden isn't charged --

11 MR. FERAZANI: -- in the money laundering
12 conspiracy.

13 THE COURT: -- in Count Four.

14 MR. FERAZANI: Right.

15 THE COURT: I don't think.

16 MR. FERAZANI: The -- I guess the issue is
17 Paragraph 20, and the language in Paragraph 20 charges
18 Mr. McFadden, with the other co-conspirators who have
19 pled guilty, to engaging in the scheme to manipulate a
20 House Stock -- one of the House Stocks -- in this
21 case, the only one attributable to Count Three is the
22 Classica Group -- by five methods.

23 To the extent Mr. McFadden is only admitting
24 to or is going to articulate to Paragraph -- to the --
25 accepting unauthorized commissions, or excessively

1 high commissions that are not being described to the
2 customers, he may, during his allocution, if he wants
3 to specifically deny the remaining sections of
4 Paragraph 20, I am not opposed to that, depending on
5 what his allocution is.

6 THE COURT: All right. The reason I want
7 to be careful about this is because I know there's
8 case law that says, essentially, you plead guilty to a
9 count, you admit the count.

10 Now, it may have absolutely no bearing on
11 practically what happens in this case. And not admit
12 in the sense that you necessarily agree it's true.
13 But it means you don't contest it. And, you know,
14 with respect to conduct not attributed to you, you
15 don't need to.

16 But, if you're concerned about the
17 implications of pleading guilty to a charge that
18 contains these allegations, then maybe you should
19 negotiate, you know, something -- something else.
20 Perhaps filing of an information. I leave that up to
21 you.

22 But, to the extent that you're concerned,
23 then you shouldn't plead guilty, Mr. McFadden, because
24 of what the law might think you are admitting by
25 pleading guilty, that is in addition to the specific

1 facts that you say you did, I'm not going to advise
2 you. I'm just going to say, you know, then you --
3 then you live with that uncertainty.

4 So, I'll leave it to you, if you want to
5 talk it over with your counsel about how to proceed.

6 MR. MCINNIS: Yeah, could we have a second,
7 Your Honor?

8 THE COURT: Sure, yeah.

9 MR. MCINNIS: I may also need to talk to
10 Mr. Ferazani.

11 THE COURT: Yeah.

12 [TAPE STOPPED AND STARTED.]

13 MR. MCINNIS: Mr. McFadden, some of them
14 have what we just referred to between ourselves as --
15 as kind of a laundry list of things that were done by
16 some of the other Defendants, and not Mr. McFadden.
17 But, I think that there is a crystal clear
18 understanding between me and Mr. Ferazani, as to which
19 of those things in the laundry list Mr. McFadden is
20 responsible for. And that if he today, or in his
21 discussions with Probation, allocutes to those things,
22 but denies the other, again, that he's not going to be
23 losing acceptance of responsibility under the plea
24 agreement.

25 THE COURT: Is that your understanding?

1 MR. FERAZANI: If -- if I may, Your Honor?
2 Specifically referencing the Paragraph 20,
3 --

4 THE COURT: Yes.

5 MR. FERAZANI: -- which outlines the
6 conduct collectively of the named Defendants in the
7 indictment, the conduct (a) -- that is listed as (a)
8 through (f), which --

9 THE COURT: Yes.

10 MR. FERAZANI: -- makes up the overall
11 scheme, clearly Mr. McFadden was one component to the
12 scheme, and the Government concedes that, for the
13 purposes of this plea, the Government would be able to
14 -- to prove, and Mr. McFadden is going to allocute
15 sub (e) and sub (f) as his portion.

16 Sub (e) and sub (f), when one cross-
17 references that with Count Three, it's consistent with
18 the charge, and also it will make out a -- a legally
19 sufficient plea. In fact, the fact that the devices,
20 scheme, and artifice to defraud in this case is Mr.
21 McFadden, as the broker, accepting excessive
22 commissions which he failed to disclose to his
23 clients. And, those would be the statements of
24 material fact, and omission of those material facts.
25 And, that was the act, practice, and course of

1 business which was a deception to his clients.

2 So therefore, Your Honor, I believe that the
3 facts that Mr. McFadden will allocute to will be
4 sufficient for Paragraph -- for Count Three. And, to
5 the extent (a) through (d), in Paragraph 20, are not
6 facts that Mr. McFadden is going to allocute to, I
7 don't think that is going to affect this plea.

8 THE COURT: All right. So, while
9 Paragraph 20 talks about conduct engaged in by a
10 number of people, it's the Government's position that,
11 to the extent it refers to Mr. McFadden, sub-parts (d)
12 and (e) --

13 MR. FERAZANI: Correct, Your Honor.

14 THE COURT: -- refer to him, and these
15 remaining sub-parts simply refer to others.

16 MR. FERAZANI: Correct, Your Honor.

17 THE COURT: Okay. Mr. McInnis, is that
18 your understanding?

19 MR. MCINNIS: Exactly, Your Honor, and --

20 THE COURT: Okay.

21 MR. MCINNIS: -- thank you for allowing us
22 to do that.

23 THE COURT: Very good.

24 BY THE COURT:

25 Q Mr. McFadden, do you have any questions? I

1 know this is -- there's a lot of technical stuff we've
2 been talking about here, but do you have any questions
3 about that?

4 (Pause)

5 MR. McINNIS: Do you have any questions?

6 A Could I just briefly --

7 Q Yes, please. Yeah.

8 (Defendant and counsel conferring.)

9 MR. McINNIS: We're ready, Your Honor.

10 Thank you.

11 THE COURT: All right.

12 MR. McINNIS: Thank you.

13 A (Continuing.) I am -- I am ready, Your
14 Honor.

15 Q And no -- any further questions?

16 A No, sir.

17 Q All right. Now -- and, I just want to make
18 sure you understand, because I will answer any
19 questions you have, if you need them answered before
20 you decide whether to plead guilty.

21 A I'm okay, sir.

22 Q All right.

23 THE COURT: Mr. McInnis, do you know of any
24 reason why your client should not plead guilty to
25 Count Three?

1 MR. McINNIS: No.

2 THE COURT: And are you aware of any viable
3 legal defense to the charge?

4 MR. McINNIS: No.

5 BY THE COURT:

6 Q Mr. McFadden, are you ready to plead guilty
7 to Count Three of the indictment?

8 A Yes, Your Honor.

9 Q And, how do you plead to the charge
10 contained in Count Three of the indictment, guilty or
11 not guilty?

12 A I plead guilty, Your Honor.

13 Q And, are you making this plea of guilty
14 voluntarily, and of your own free will and accord?

15 A Yes, Your Honor.

16 Q Has anyone threatened you or forced you to
17 plead guilty?

18 A No, Your Honor.

19 Q Other than the agreement with the Government
20 in the -- in the plea agreement document that we've
21 been discussing, other than that, has anyone made you
22 any promise that has caused you to plead guilty?

23 A No, Your Honor.

24 Q Has anyone made you any promise about the
25 sentence that you'll receive?

1 A No, Your Honor.

2 Q And, of course, nobody could make you such a
3 promise because, as I've now told you several times,
4 only Judge Spatt has the ability to decide on the
5 proper sentence in this case.

6 Do you understand that?

7 A Yes, Your Honor.

8 Q Now, tell me briefly, in your own words,
9 what you did that makes you guilty of Count Three of
10 the indictment.

11 A Here's what I did that makes me guilty.
12 From February of 2002, until June, 2002, I was a
13 Registered Representative at the Garden City branch of
14 Donald and Company.

15 Q Mr. McFadden, I'm sorry.

16 A I'm sorry.

17 Q Slow down. I know this is a difficult
18 moment for you. Slow down. Speak clearly. And --
19 and, tell me what you did.

20 (Pause)

21 A From February of 2002, until June, 2002, I
22 was a Registered Representative at the Garden City
23 branch of Donald and Company, a Registered
24 Broker/Dealer.

25 During that time, I bought for some of my

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1 customers shares of a company called the Classica
2 Group, Inc.. Classica -- Classica's shares traded on
3 the NASDAQ market. Donald was a market maker in
4 Classica.

5 Q I'm sorry. You said a "market maker"?

6 A A market maker, yes.

7 Q Okay. Go ahead.

8 A I received -- Donald was a market maker in
9 Classica. I received commissions from Donald for
10 buying and selling Classica for my customers.

11 I admit that, on occasions, the amount of
12 commissions I received on Classica were significantly
13 greater than the amount that my customers thought I
14 was receiving. And, I admit that I know or suspect
15 that my customers were deceived as to true amount of
16 commissions I was receiving for Classica.

17 For example, on February 25th, 2002 --
18 excuse me.

19 (Pause)

20 A (Continuing.) On February two thousand
21 twenty-five, I bought ten thousand shares of Classica
22 for a customer, and I received twenty-three cents a
23 share -- twenty-three hundred dollars in commissions.
24 This sale was the result of a phone call. I knew or
25 suspected that my customer was in Ohio. I believed

1 that I was getting -- he believed he was getting much
2 less than twenty-three cents a share. He most likely
3 thought I was getting -- he was getting one cent or
4 less.

5 I knew at the time I was buying Classica
6 that a customer wants to know and was entitled under
7 the law to know the amount of commissions he was
8 actually paying. And, I know that I was wrong to
9 deceive or allow a customer to be deceived as to the
10 true amount of commissions on a transaction.

11 In conclusion, I know at that time I was
12 committing a form of securities fraud by receiving
13 commissions on the Classica that were far in excess
14 for the amount that my customers knew about.

15 (Pause)

16 A (Continuing.) I also admit that a cross on
17 one trade in Classica. This is why I pleaded guilty
18 on the Count Three of the indictment.

19 Q Okay. Thank you, sir. Are you finished?

20 A Yes.

21 Q All right.

22 THE COURT: Mr. Ferazani, do you think
23 there is anything further I need to elicit? I
24 understand there is some pronoun issue about who
25 understood what, with respect to the -- the

1 commissions, but I understood it, certainly. I think
2 the record is clear. Anything --

3 MR. FERAZANI: I think the record was clear
4 when he stated that he believed or suspected that his
5 clients were misled as to the amount of commission.

6 THE COURT: All right. Anything further
7 that you wish to have me elicit?

8 MR. FERAZANI: No, Your Honor.

9 THE COURT: And, do you wish to put on the
10 record anything further about what the Government
11 would prove if there were a trial in this case?

12 MR. FERAZANI: No, Your Honor.

13 THE COURT: Is there anything further you
14 think I should cover, to satisfy the requirements of
15 Rule 11?

16 MR. FERAZANI: No, Your Honor.

17 THE COURT: Mr. McInnis, is there anything
18 further that you'd like me to go over, to make sure
19 that I have satisfied the requirements of Rule 11?

20 MR. MCINNIS: No, Your Honor.

21 THE COURT: All right. Based on the
22 information that has been given to me, and that has
23 occurred in court, I find that -- that Mr. McFadden is
24 proceeding with a clear head, that he understands his
25 surroundings and is competent to proceed.

1 I find that he is acting voluntarily. I
2 find that he fully understands the charge against him.
3 That he understands his rights, fully understands his
4 rights, and also the consequences of his plea.

5 I further find that there is a factual basis
6 for his plea. And, subject to concerns I have about
7 the Government's compliance with the Crime Victims
8 Rights Act, about which I will make a separate
9 recommendation to the Court, I do find that there is
10 factual basis, and I will recommend, with that
11 condition, that the Court accept Mr. McFadden's plea
12 of guilty to Count Three of the indictment.

13 Mr. Ferazani, what's the Defendant's
14 condition -- status, with respect to bail?

15 MR. PERAZANI: He is out, on a secured
16 bond.

17 THE COURT: Is there any suretor of that
18 bond?

19 (Counsel conferring.)

20 THE COURT: Mr. McInnis, just --

21 MR. MCINNIS: You're a co-signer?

22 THE COURT: All right.

23 MR. MCINNIS: Yeah, his wife is a co-
24 signer.

25 THE COURT: All right. Ma'am, I -- and,

1 just for the record, I'm speaking to -- I take it
2 you're Mr. McFadden's wife? All right. And, I'm
3 speaking to Mr. McFadden's wife, who is in the
4 gallery.

5 Before approving continuing Mr. McFadden on
6 bail, because the law changes once he's entered a plea
7 of guilty, I just want to make sure that -- that Mrs.
8 McFadden is content to remain a suretor on the bond.

9 Are you, ma'am?

10 MRS. MCFADDEN: Yes.

11 THE COURT: All right. And, she's
12 indicated she is.

13 Mr. Ferazani, you -- do you concur that
14 continuing Mr. McFadden on bond will, by clear and
15 convincing evidence, secure the safety of the
16 community and his return, as required?

17 MR. FERAZANI: Yes, Your Honor.

18 THE COURT: All right. I will order that
19 he continue on -- on bond, as -- as previously
20 ordered.

21 Now, I don't have a sentencing date to give
22 you. I'll ask you to get in touch with Mary Ellen in
23 Judge Spatt's chambers on Tuesday, to arrange a
24 sentencing date.

25 Is there anything else, folks?

1 MR. FERAZANI: No, Your Honor.

2 MR. MCINNIS: No, Your Honor.

3 THE COURT: All right. Thank you, all.

4 (Whereupon, the proceeding was concluded.)

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C E R T I F I C A T E

I, JUNE ACCORNERO, do hereby certify that I typed the preceding minutes of a hearing held on September 1, 2005, in the matter of UNITED STATES OF AMERICA V. PATRICK McFADDEN, Criminal Docket No. 2:04-cr-00455-ADS-9, before Magistrate Judge James Orenstein, in the United States District Court for the Eastern District of New York, Central Islip, New York, from tapes recorded, duplicated, and provided by the court, and that this is as accurate a transcript as possible of the contents of those tapes, to the best of my ability, based upon the quality of the recording provided.

June Accornero
JUNE ACCORNERO, transcriber *ra*